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7                   **UNITED STATES DISTRICT COURT**  
8                   **SOUTHERN DISTRICT OF CALIFORNIA**

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10           UNITED STATES OF AMERICA,

CASE NO. 08cr1003WQH

11                 vs.                                          Plaintiff,

ORDER

12           LUIS GOMEZ-DOMINGUEZ

13                 Defendant.

14 HAYES, Judge:

15           The matter before the Court is Defendant's Motion to Suppress Statement (#13-5).

16                   **FACTUAL BACKGROUND**

17           On Tuesday, March 4, 2008, at 9:05 a.m., United States Border Patrol Field Operations  
18 Supervisor Adan Cortez was performing his duties west of the Otay Mesa Port of Entry.  
19 Supervisor Cortez has performed border patrol duties at the Imperial Beach Station for over  
20 nineteen years with responsibility from the Pacific Ocean to the Otay Mesa Port of Entry.  
21 Another border patrol agent alerted Supervisor Cortez via service radio that the agent had  
22 observed three individuals going north from the secondary fence in the channel located 1.5  
23 miles west of the port of entry. Supervisor Cortez responded to this location about seventy five  
24 yards north of the international border in an area known by the Supervisor Cortez to be used  
25 by undocumented aliens to illegally enter the United States. Supervisor Cortez described this  
26 area as a brushy, open area which is a short run north to a subdivision. The area can be viewed  
27 from the second story buildings to the north. Supervisor Cortez searched the area and found  
28 crawl signs going north into the grass. Supervisor Cortez apprehended three individuals,

1 including the Defendant, laying flat in the brush. Supervisor Cortez credibly testified at the  
 2 evidentiary hearing as follows:

3           Cortez: Once I had them all secured, I had them all sit down and then I  
               had them – I asked them once in Spanish if they were all Mexican  
               citizens, and they all replied, yes.  
 4           Attorney: Among those individuals was the Defendant?  
 5           Cortez: Yes.  
 6           Attorney: So the Defendant said that he was a Mexican citizen?  
 7           Cortez: Yes.  
 8           Attorney: Did you ask the Defendant his manner of entry into the United  
               States?  
 9           Cortez: Yes, I asked him in Spanish if they just jumped over, and they all  
               indicated yes, they had just jumped over.

10 Transcript page 9. Defendant was detained and transported to the border patrol station.

11           Defendant testified at the evidentiary hearing that Supervisor Cortez was not the border  
 12 patrol agent who arrested him. Defendant testified that he ran away from the first agent and  
 13 that he was apprehended by a second agent who was not Supervisor Cortez. Defendant  
 14 testified that the second agent who apprehended him pointed a baton at him and that  
 15 Supervisor Cortez did not point a baton at him when he initially encountered him. Supervisor  
 16 Cortez testified that he did not have a baton on March 4, 2008 and that he does not carry a  
               baton.

17           Defendant was subsequently charged with knowingly and intentionally attempting to  
 18 enter the United States after having been previously excluded, deported and removed and not  
 19 having obtained permission to reenter in violation of 8 U.S.C. § 1326 (a) and (b).

## 20           **CONTENTIONS OF THE PARTIES**

21           The Government seeks to offer at trial the testimony of Supervisor Cortez that on March  
 22 4, 2008 the Defendant responded that he was a Mexican citizen and that he had just jumped  
 23 the fence. The Government contends that *Miranda* warnings were not required prior to this  
 24 routine questioning on the grounds that 1) the Defendant was not in custody when questioned;  
 25 2) detention for border questioning does not require *Miranda* warning; and 3) reasonable  
 26 suspicion existed to detain the Defendant and establish his identity.

27           Defendant contends that he was in custody when he was interrogated by Supervisor  
 28 Cortez and that *Miranda* warnings were necessary prior to any questioning. Defendant

1 contends that his freedom of action was restrained, that he did not feel free to leave, and that  
 2 he feared he would be hit with a baton if he did not comply. Defendant asserts that the agent  
 3 suspected him of being in the United States illegally and proceeded to ask him questions about  
 4 his citizenship and immigration status which were likely to elicit incriminating answers.

## 5 ANALYSIS

6 The issue raised by the Defendant is the whether *Miranda* warnings were required  
 7 before Supervisor Cortez asked the Defendant any questions at the initial encounter in the  
 8 field. Warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966) are required prior to  
 9 “custodial interrogation.” *Id.* at 444. Whether a defendant was constitutionally entitled to a  
 10 *Miranda* warning is an issue of law and whether a person is “in custody” for the purposes of  
 11 *Miranda* is essentially a question of fact. *United States v. Galindo-Gallegos*, 244 F.3d 728,  
 12 730 (9th Cir. 2001).

13 In *Galindo-Gallegos*, “[t]wo border patrol agents were looking for aliens about 1800  
 14 feet north of the Mexican border. They saw a large group of people running, assumed they  
 15 were illegal aliens because of the location and that fact that they were running, and stopped  
 16 them. One of the agents told the people to sit down on the ground. The other agent chased  
 17 those who ran away. Among those he caught was ... Galindo-Gallegos. Once they had the  
 18 to 20 people seated, an agent asked them what country they were from and whether they had  
 19 a legal right to be in the U.S. Galindo-Gallegos said he was from Mexico and had no such  
 20 right.” *Id.* at 729. The trial judge found the officers “in no way coerced these people to talk”  
 21 in the field, and found that “these are questions that need to be routinely asked of individuals  
 22 who are caught near the border.” *Id.* at 730. The Court of Appeals concluded that under the  
 23 facts of the case, the individuals were not “in custody” for the purposes of *Miranda* and the  
 24 motion to suppress was properly denied. The Court of Appeals explained “[w]here officers  
 25 apprehend a substantial number of suspects and question them in the open prior to arrest, this  
 26 is ordinarily a *Terry* [v. Ohio, 392 U.S. 1 (1968)] stop, not custodial questioning.” *Id.* at 732.

27 A *Terry* stop is a brief investigatory stop which is an exception to the probable cause  
 28 requirement of the Fourth Amendment. “The Fourth Amendment does not proscribe all

1 contact between the police and citizens, but is designed to prevent arbitrary and oppressive  
2 interference by enforcement officials with the privacy and personal security of individuals.”  
3 *INS v. Delgado*, 466 U.S. 210, 215 (1984). “Beginning with *Terry v. Ohio*,[], the Court has  
4 recognized that a law enforcement officer’s reasonable suspicion that a person may be  
5 involved in criminal activity permits the officer to stop the person for a brief time and take  
6 additional steps to investigate further. (citation omitted.) To ensure that the resulting seizure  
7 is constitutionally reasonable, a *Terry* stop must be limited. The officer’s actions must be  
8 justified at its inception, and ... reasonably related in scope to the circumstances which justified  
9 the interference in the first place.” *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185  
10 (2004).

11        *Miranda* warnings are necessary even during a *Terry* stop if the suspect has been taken  
12 into custody or if the questioning takes place in a police dominated or compelling atmosphere.  
13 However, *Terry* stops, though inherently somewhat coercive, do not usually involve the type  
14 of police dominated or compelling atmosphere which necessitates *Miranda* warnings. *U.S. v.*  
15 *Bautista*, 684 F.2d 1289, 1291 (9th Cir. 1982) (handcuffing a suspect does not automatically  
16 turn a lawful investigative stop into a de facto arrest). “A brief but complete restriction of  
17 liberty, if not excessive under the circumstances, is permissible during a *Terry* stop and does  
18 not necessarily convert the stop into an arrest.” *Id.* at 1289; *See also, United States v. Parr*,  
19 843 F.2d 1228, 1230 (9th Cir. 1988) (there is no per se rule that detention in a police car  
20 constitutes an arrest).

21        This Court concludes that the information and observations of Supervisor Cortez lead  
22 him to reasonably suspect that the Defendant was involved in criminal activity. Supervisor  
23 Cortez received a report of three individuals going north from the border fence in an area  
24 known to him to be used by undocumented individuals to illegally enter the United States.  
25 Supervisor Cortez found crawl marks heading north and located three individuals laying in the  
26 brush seventy five yards north of the border fence. Supervisor Cortez was justified in briefly  
27 detaining these individuals to investigate further. When he encountered each of the three  
28 individuals, Supervisor Cortez identified himself as border patrol and directed each of the

1 individuals not to move.<sup>1</sup> Once Supervisor Cortez had all three individuals in the same  
2 location, he had them all sit down and asked them in Spanish one time whether they were all  
3 Mexican citizens and if they had just jumped the fence. All three individuals, including the  
4 Defendant, voluntarily answered the brief and limited questioning. The brief stop and limited  
5 questioning about the Defendant's citizenship and his method of entry into the United States  
6 was justified at its inception, and reasonably related in scope to the circumstances which  
7 justified the interference in the first place. There is no evidence in this case of oppressive  
8 police conduct, custodial arrest, or police dominated atmosphere. Under the facts of this case,  
9 this Court concludes that the brief stop and limited questioning was not custodial interrogation  
10 which required *Miranda* warnings. See, *United States v. Brignoni-Ponce*, 422 U.S. 873, 881  
11 (1975) ("... we hold that when an officer's observations lead him reasonably to suspect a  
12 particular vehicle may contain aliens who are illegally in the country, he may stop the car  
13 briefly and investigate the circumstances that provoke suspicion.").

14 It is hereby ordered that Defendant's Motion to Suppress Statement (#13-5) is denied.

15 DATED: June 24, 2008

16   
17 **WILLIAM Q. HAYES**  
18 United States District Judge

27  
28 <sup>1</sup> There is no evidence that Supervisor Cortez carried a baton or threatened the Defendant with  
a baton. Defendant's subsequent escape and apprehension by a second agent has no bearing on the  
admissibility of his statements to Supervisor Cortez.